Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1342

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JACK L. WILLIAMS, ROBERT H. CRIST and D. EUGENE THORNE, Petitioners,

v.

TIMOTHY MILONAS, JR. and KENNETH RICE, ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 691 F.2d 931.

STATEMENT OF FACTS

This lawsuit was brought by two juveniles confined at the Provo Canyon School by juvenile court officials in Nevada and Alaska. Contrary to the picture painted by the petitioners in their Statement of Facts, the unique and punitive nature of this institution is fully described in the Court of Appeals opinion. (Petitioners' App. A., 5a-7a.)

After a lengthy trial and substantial testimony and documentary evidence recounting the active involvement of juvenile courts, school districts and state education and welfare agencies with the placement of children and the practices at Provo Canyon School, the District Court found that the petitioners had acted "under color of state law" within the meaning of 42 U.S.C. §1983

(1976).[1/]

Having found jurisdiction, the District Court permanently enjoined the petitioners' practices of (1) subjecting boys to polygraph examinations to discern and control their thoughts, (2) reading and censoring boys' mail as a means of controlling their thoughts and preventing criticism of the Provo Canyon School, (3) placing boys in stark isolation rooms for lengthy periods of time as a method of punishment and control, and (4) using excessive physical force, including a practice at the facility known as the "hair dance" (Petitioners' App. A.,

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1/ The District Court also found jurisdiction under the Education of All Handicapped Children Act, 20 U.S.C. §1401, et seq. and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Because the Court of Appeals agreed with the District Court's finding of jurisdiction under 42 U.S.C. §1983, it did not reach the question of independent jurisdiction under the federal special education statutes.

Petitioners' App. B., 74a-78a). The evidence at trial, taken as a whole,[2] clearly established that these practices were oppressive, arbitrarily used, and totally unrelated to any legitimate purpose of the institution. The Court of Appeals unanimously affirmed these findings of the District Court, and a motion for a rehearing with a suggestion for a rehearing en banc was denied.

REASONS THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition.

Petitioners have asked this Court to grant certiorari to determine whether a

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2/ Petitioners have included in their list of appendices excerpts from the trial record. (Petitioners' App. D.) Nevertheless, it is clear that in this type of factual determination, selected and isolated excerpts from a 19-day trial are of little value when compared with the total review of the record conducted by the District Court and the Court of Appeals.

private party becomes a "state actor" under the Federal Civil Rights Act simply because it has some state contracts or is subjected to limited state regulation and where the practices or procedures enjoined below "are not regulated, coerced or even encouraged by any state agency." (Questions Presented, Nos. 1 and 2.) These questions have little relationship, if any, to the actual record in this case and are totally inconsistent with the detailed and specific factual findings of the Court of Appeals and the District Court below.

The factual basis for the Court of Appeals' and District Court's conclusion that "the enjoined practices were carried out under the cloak of state action" is summarized in the Court of Appeals opinion. (Petitioners' App. A., 16a.)

In so ruling, the Court of Appeals referred to a veritable mountain of

documentation regarding the closely intertwined relationship between the defendants and the juvenile courts and state agencies which sent boys to the facility. At the trial, plaintiffs presented as evidence the court files of boys placed at Provo Canyon by Alaska juvenile court judges. The files demonstrate that "Classification Committees" in Alaska recommended placement of the boys at Provo Canyon, Alaska juvenile court probation officers and the Alaska Interstate Compact Administrator contacted the petitioners and officially applied for placement of the boys, the Alaska juvenile court formally approved each placement, and Alaska juvenile court probation officers signed Provo Canyon institutional forms in lieu of the boys' parents or guardians. At the request of the Alaska Interstate Compact Administrator, personnel from the

Utah Interstate Compact Administrator's office visited Provo Canyon and reported on the condition of the boys. In addition, the boys' "therapists" at the facility made monthly reports to the Alaska juvenile court probation officers on the boys' "progress." Perhaps most importantly, the Alaska juvenile court files refer to

> ...Provo Canyon School, acting as an agent of the Department of Health and Social Services, Division of Corrections...

The juvenile courts in other states sending boys to Provo Canyon exercised similar control and supervision.

The named plaintiffs were placed, supervised, and monitored at Provo Canyon by juvenile court judges in precisely this way. Plaintiff Kenneth Rice was committed to Provo Canyon by an Alaska juvenile court judge; plaintiff Timothy Milonas was placed by his mother as a condition of probation imposed by a Nevada juvenile

court. Indeed, the Nevada juvenile court judge was listed as legal guardian and supervisor in Milonas' application to Provo Canyon, and when the boy ran away from the facility, the juvenile court judge issued a bench warrant for his arrest.

The school districts and other state agencies sending boys to Provo Canyon exercised similar control and supervision. The state agencies maintained their control and supervision through six different means: (1) written contracts between the school districts and the petitioners, which included reimbursement for "counseling and guidance" in addition to formal educational services; (2) separate "Service Agreements" between the school districts and the petitioners, which provided additional requirements for the facility; (3) confirmations of compliance with minimum educational

standards, which detailed further requirements, and which were personally signed by the petitioners; (4) the requirements of Public Law 94-142, the Education of All Handicapped Children Act, 20 U.S.C. §§1401-1461, and its implementing regulations, e.g., 34 C.F.R. §§104.33(b)(3), 104.37, 300.2(c), 300.306, 300.550-556, 300.341, 300.347, 300.600, and Subpart D; (5) the requirements of state statutes and regulations governing the provision of special education to handicapped children, e.g., California Education Code §§56000-56885; and (6) regular monitoring and evaluation of the petitioners' facility by representatives of the various school districts.

For boys placed at Provo Canyon both by juvenile courts and by school districts and other state agencies, the large volume of evidence was more than sufficient to

demonstrate that "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions." (Petitioners' App. A., 16a.) See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Moreover, the record established a clear "nexus" between state involvement and the specific practices enjoined by the District Court. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). For example, the petitioners' censorship of mail to and from boys committed to the facility by juvenile courts was literally made possible by the probation officer's signing of the "Correspondence/Visit/Phone List" and "Supervision of Communications" form in lieu of the boys' parents or guardians. The same was true of administration of polygraph examinations: the probation officer specifically

petitioned for, and the juvenile court specifically approved, authorization for the petitioners to conduct polygraph examinations of boys committed to the school.

The situation was analogous for handicapped boys placed at the facility for special education. The record at trial demonstrated that 28% to 38% of the state special education funding went to the petitioners and Provo Canyon School for the provision of "counseling and guidance" and "psychotherapy" to handicapped boys. And the petitioners themselves admitted at trial that they considered the four enjoined practices to be important aspects of the "therapy" program.

Finally, the petitioners' reliance on Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982), affirming, 641 F.2d 14 (1st Cir. 1981), and Blum v. Yaretsky, 102

S.Ct. 2777 (1982), is clearly misplaced. Although Rendell-Baker did involve a private school, the crux of the case, for both the Court of Appeals and this Court, was the fact that the state funding and regulation pertained to student services at the New Perspectives School, not to employee personnel policies. Since there was no "nexus" between the state involvement and the challenged activity (i.e., the alleged wrongful discharge of plaintiff Rendell-Baker), there was no "state action" for the purposes of 42 U.S.C. §1983. See Rendell-Baker v. Kohn, supra, 641 F.2d at 25-26, affirmed, 102 S.Ct. at 2766-2772. This was precisely the grounds on which the Court of Appeals in the instant case distinguished Rendell-Baker:

> The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices

> which the district court has now enjoined.

(Petitioners' App. A., 17a.)

Blum v. Yaretsky presented a very different situation. This Court held that state officials could not be held liable for the actions of private nursing homes in transferring plaintiffs without notice or an opportunty for a hearing. The Court stated the crucial distinction between that case and the present appeal:

> This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the state so as to make it "state" action for purposes of the Fourteenth Amendment.

102 S.Ct. at 2785. In Blum, this Court held that the relationship between the defendant state officials and the administrators of the nursing homes was simply too tenuous to ascribe liability to the state. Id. In the present case, of course, the petitioners are themselves the

owners and operators of the Provo Canyon facility; the only order appealed from is the injunction entered by the District Court prohibiting them from continuing the mail censorship, polygraph tests, isolation, and physical brutality. Both Rendell-Baker and Blum were fully briefed for the Court of Appeals. In its decision below, the Court of Appeals did not mention Blum because the case is simply not relevant to the instant appeal.

Petitioners attempt to bootstrap their argument against a finding of state action by spending 4-1/2 pages in their petition discussing their objections to the attorney's fees award in this case. This is clearly without merit. First, other than an objection to the inclusion of one of the three named defendants in the fees award, the petitioners failed to preserve this as an appellate issue before the Court of Appeals and have not included

the propriety of the fees as a question before this Court. Second, the amount of the fees award hardly supports the petitioners' contention that the finding of state action has led to an unjust result. As the District Court pointed out, the petitioners operated the facility as a major profit-making enterprise, with gross revenues in 1979 totaling $1,857,796.67, and direct or indirect benefits in 1978 to petitioners Williams and Crist (then the sole owners) in excess of $167,000.00 each (Petitioners' App. B., 37a). These profits were made possible by the substantial infusion of public monies and from the ongoing support and participation of state agencies.

2. The decision below is fully consistent with Youngberg v. Romeo, 1025 S.Ct. 2452 (1982), and the petition does not raise any other significant legal issues.

The petitioners have raised no serious argument that the legal standard

used in this case was incorrect. They hardly could, since the District Court scrupulously adhered to this Court's holding in Bell v. Wolfish, 441 U.S. 520 (1979) and did so at the urging of the petitioners themselves.

The petitioners' real objection is that they disagree with the factual conclusions of the District Court and of the Court of Appeals, and they would like one more review of the lengthy trial record. There is nothing in the record of this case which warrants this Court's exercising its discretionary power of certiorari.

Although the District Court rendered its decision prior to this Court's ruling in Youngberg, the District Court correctly foresaw the appropriate principles and, in fact, utilized an approach identical to that ultimately adopted in Youngberg. Relying upon Bell, the District Court held

that the Fourteenth Amendment, not the Eighth, was the applicable law in this case. The District Court also determined that

> conditions of confinement must be reasonably related to legitimate purposes of confinement or to legitimate security and administrative needs of the confining facility, and may not be unreasonably restrictive in light of those legitimate purposes and needs.

(Petitioners' App. B., 74a.) Further, the District Court rejected the notion that plaintiffs were entitled to receive treatment in the least restrictive alternative possible. (Petitioners' App. B., 72a-73a.)

In applying the appropriate legal standards, the District Court heard extensive testimony regarding the nature of the practices at the Provo Canyon facility. The court heard testimony from defendants' and plaintiffs' experts, from current and former residents of Provo Canyon, and from current and former

employees of the defendants. Many of plaintiffs' witnesses testified to the arbitrary practices at Provo Canyon which, as the Court of Appeals stated, "tended to paint a picture of undue punishment, if not outright brutality, in no wise related to the school's educational program." (Petitioners' App. A., 18a.)

Similarly, the District Court listened carefully to the testimony of parents of children at Provo Canyon. While some parents expressed knowledge and support for the practices at the institution, others testified as to their total shock and outrage when they discovered what the petitioners had done to their children. The court also heard lengthy testimony from the defendants themselves regarding the motivations for their practices and their purported experience and expertise.

In reviewing each of the challenged

practices, the District Court sought to keep

> its intrusion into the affairs of the Provo Canyon School to the minimum level necessary to insure the honoring by the school of those rights protected by the Constitution and state and federal special education laws.

(Petitioners' App. B., 78a.)

The District Court showed extreme deference to the decisions made by the defendants. It broadly construed the legitimate purposes and objectives of the Provo Canyon School (Petitioners' App. B., 74a). It upheld 9 of the 13 practices challenged in this case. (Petitioners' App. B., 75a.) It specifically refused to enjoin any practices solely because plaintiffs' experts considered them inappropriate. (Petitioners' App. B., 43a.)

The District Court was willing to intervene only after all the evidence, taken as a whole, along with the purported

rationales of the defendants, failed to establish any reasonable and legitimate basis justifying the defendants' practices. The Court of Appeals fully reviewed the District Court's decision and the record in this case after this Court's decision in Youngberg v. Romeo, asked for and received special briefing specifically on this point, and unanimously held that "the District Court's findings and conclusions on this matter ... are amply supported by the record." (Petitioners' App. A., 23a.)

Petitioners' alternative reliance on Parham v. J.R., 442 U.S. 584 (1979), is totally inapposite. As the District Court properly observed,

> Parham was not concerned with conditions of confinement; it was concerned with procedures by which confinement may occur.....However, Parham did hold that where confinement is to occur at a state facility, even the "voluntary" or private placement by parents was subject to procedural scrutiny under the Due Process Clause of the

Constitution.

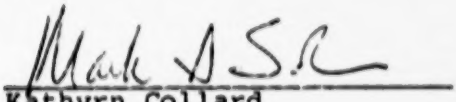
(Petitioners' App. B., 73a-74a.)

In this case the petitioners subjected children to four practices which the District Court found abusive and tantamount to "punishment" if inflicted on adult felons. For example, the District Court found that the petitioners used the polygraph at Provo Canyon as "an 'instrument of terror' rather than therapy." (Petitioners' App. B., 76a.) This decision fully comports with the principles established in Youngberg. The District Court carefully deferred to the judgment of the defendants and held them only to a standard of reasonableness. It diligently sought to minimize any undue interference with the operation of Provo Canyon. Only when the defendants' actions and practices were so outrageous and clearly punitive did the District Court intervene.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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